95-1746 (1)

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

MICHAEL D. LONGSHORE, Individually and on behalf of all others similarly situated,

Petitioners,

v.

THE UNITED STATES,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a statutory user fee that is not reasonably related to, nor a fair approximation of, the costs incurred by the Government in providing the service for which the fee is imposed constitutes a taking.

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Michael D. Longshore, individually and on behalf of all others similarly situated, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Federal Circuit (App. 1-11) is reported at 77 F.3d 440. The opinion of the United States Court of Federal Claims (App. 11-12) is unreported.

JURISDICTION

The Federal Circuit issued its opinion on February 21, 1996 (App. 2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part, that "nor should private property be taken for public use without just compensation."

At all times pertinent hereto, Section 158(g) of Title 47 of the United States Code, 47 U.S.C. § 158(g), provided, in relevant part, that "the Schedule of Application Fees which the Federal Communications Commission

shall prescribe pursuant to subsection (a) of this section shall be as follows: . . . 3. Cellular Systems $200.00."[1]

STATEMENT

The underlying facts that gave rise to this case are simple. Moreover, because this is an appeal from a decision dismissing a complaint for failing to state a claim upon which relief can be granted, all factual allegations in the complaint must be deemed to be true. *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

In 1982, Congress enacted the Communications Amendment Act of 1982, Pub. L. No. 97-259, § 115, 96 Stat. 1087, 1094-95, codified at 47 U.S.C. § 309(i), which authorizes the Federal Communications Commission (FCC) to employ a random selection process, known as a lottery, in selecting licensees for certain communication services regulated by the FCC. In 1985, the FCC adopted rules for using the lottery process in awarding cellular radio system licenses. 47 C.F.R. §§ 1.823, 22.33 (1994).

In 1986, Congress enacted the Comprehensive Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272, § 5002(e), 100 Stat. 82, 118, codified at 47 U.S.C. § 158 (1988). That statute required that a $200 application fee accompany each application for participation in the lottery for licenses to construct and operate a domestic cellular radio system in an area designated by the FCC as

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[1] Section 158(g) has since been amended to increase the amount of the user fee to $230.

a rural service area market (RSA). 47 U.S.C. § 158(g) (1988).

The expressed intent of Congress in imposing user fees on FCC applicants was to recoup the costs of regulation which the FCC incurred in processing applications. H.R. 99-300, 99th Congress 2d Sess. 506, U.S. Code Cong. & Admin. News 1986, p. 1021 (the user fees contained in the statute are "based on [the] cost of regulation"). In amending 47 U.S.C. § 158, Congress reaffirmed its desire to base the user fees upon the cost of regulation: "The Committee made an explicit decision to meet its Reconciliation obligations by retaining a fee structure that is based on the cost of regulation." H.R. 101-247, 101st Congress 1st Sess. 546 (1988), U.S. Code Cong. & Admin. News 1988, p. 2267.

Longshore filed 312 applications for cellular licenses in various RSAs. With each application Longshore submitted the required $200 fee, for a total of $62,400. The FCC received more than 288,000 RSA cellular applications, *Amendment of the Commission's Rules to Establish New Personal Communications Services, Notice of Proposed Rulemaking and Tentative Decision*, 7 F.C.C.R. 5676, 5763 (Appendix D), and received approximately $57 million in user fees.

In July 1994, Longshore filed a complaint against the United States in the United States Court of Federal Claims. The jurisdiction of the Court of Federal Claims was invoked pursuant to 28 U.S.C. § 1491, the Tucker Act, because the complaint alleges a taking of property by the United States.

Longshore alleges in his complaint and on appeal asserts that "[t]he $200 user fee for filing cellular applications is unreasonable because the amount of this user fee is not reasonably related to, nor a fair approximation of, the costs incurred by the FCC in processing cellular applications. The $200 filing fee is unreasonable because the amount of this user fee greatly exceeds the actual costs incurred by the FCC in providing the service the cost of which the $200 user fee was enacted to re-coup." Complaint at ¶ 23. Longshore contends that an unreasonable user fee constitutes a cognizable taking under established Supreme Court jurisprudence.

The United States Court of Federal Claims, citing *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, 2316, 129 L.Ed. 304 (1994), found that "[a] payment made voluntarily is not a taking." App. 13. Because it dismissed the complaint, the Court of Federal Claims did not rule on Longshore's motion for class certification.

The Federal Circuit affirmed the decision of the Court of Federal Claims, although on different grounds. Specifically, the Federal Circuit found that the issue of whether the payment of the user fee was voluntary was not relevant. App. 6. Instead, the court found that the dispositive issue was whether Longshore had a property interest that was taken from him by government action. *Id.* The court focused its inquiry on whether Longshore had a property interest in the government service or benefit he was seeking and not on whether Longshore had a property interest in the money he paid to the government for the user fee at issue herein. App. 6-9.

The court rejected Longshore's reliance on *United States v. Sperry*, 493 U.S. 52 (1989) and *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980). The court held that *Sperry* and *Webb's* are inapposite because the money paid by the plaintiffs in those cases as user fees was held or controlled by the government whereas the money Longshore paid to the government as a user fee was not held or controlled by the government but was instead paid directly to the government by Longshore. App. 11.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision is in direct conflict with the constitutional principle this Court announced and used to reach its decisions in *Sperry* and *Webb's*, *viz.*, an unreasonable user fee constitutes a taking. This direct conflict justifies summary reversal of the Federal Circuit's decision. In addition, the decision is in direct conflict with the Eleventh Circuit's decision in *Marshall County Board of Education v. Marshall County Gas District*, 992 F.2d 1171 (11th Cir. 1993), wherein the Eleventh Circuit, citing *Sperry*, held that an allegation that a user fee is unreasonable supports a takings claim.

Finally, the question presented in this case is of national importance because all levels of government rely on user fees as an efficient method of allocating government resources and services and as an equitable means of raising revenue to offset the costs of government services. Billions of dollars are raised each year by governmental bodies through the imposition of user fees. Given this background, it is extremely important that this Court

reiterate the constitutional principle it enunciated in *Webb's, viz.*, the Takings Clause is implicated when a user fee is not "reasonably related to the costs of using [the Government service]." 449 U.S. at 163. Absent such an affirmance of established Supreme Court precedent, governmental bodies will be able to rely on the Federal Circuit decision to impose unreasonable user fees unrestrained by the strictures of the Takings Clause, thereby forcing some individuals "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). In addition, if governments are free to impose unreasonable user fees, the goals of efficiency and equity will be frustrated.

I) THE FEDERAL CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *SPERRY* AND *WEBB'S*

The Federal Circuit characterizes Longshore's takings claim as a "novel takings argument." App. 2. Longshore's takings claim, however, is far from novel – it is based upon this Court's decisions in *Sperry* and *Webb's*, decisions with which the Federal Circuit's decision is in direct conflict. *See also: American Medical Association v. Reno*, 857 F.Supp. 80, 85 (D.D.C. 1994) (AMA alleged that certain user fees imposed by Drug Enforcement Agency were unreasonable so as to constitute a taking [issue not reached after district court held it lacked jurisdiction to hear takings claim]), *remanded on other grounds*, 57 F.3d 1129 (D.C. Cir. 1995).

Sperry involved a challenge to the 1.5% deduction on awards made by the Iran-United States Claims Tribunal, as established by Section 502 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987. These user fees, like the user fees at issue herein, were intended as reimbursement for expenses incurred by the United States in connection with rendering the services for which the user fees were imposed. *Sperry*, 493 U.S. at 60. Based on these facts, this Court established a test that a plaintiff must meet in order to establish that a user fee designed to recoup government expenses constitutes a taking:

> Given especially this specific declaration by Congress that the deductions are intended to reimburse costs incurred by the United States, the burden must lie with Sperry to demonstrate that the reality of § 502 belies its express language before we conclude that the deductions are actually takings.

Id. Because Sperry merely argued that a user fee consisting of 1.5% of its award was excessive *per se*, it failed to meet its burden of proof under the Court's test and lost the case.

In contrast, Longshore alleges in his complaint that the reality of the imposition of the $200 user fee belies the express language of the legislative intent of recovering the cost of regulation:

> The $200 user fee for filing cellular applications is unreasonable because the amount of this user fee is not reasonably related to, nor a fair approximation of, the costs incurred by the FCC in processing cellular applications. The $200 filing fee is unreasonable because the amount of this user fee greatly exceeds the actual costs

> incurred by the FCC in providing the service the cost of which the $200 user fee was enacted to recoup.

Complaint at ¶ 23.

Similarly, in *Webb's*, this Court explicitly recognized that the Takings Clause is implicated when a user fee is not "reasonably related to the costs of using [the Government service]." 449 U.S. at 163.

Thus, Longshore has stated a takings claim pursuant to the test enunciated by this Court in *Sperry* and *Webb's*.

The Federal Circuit attempted to distinguish *Sperry* and *Webb's* based on the fact that the government held or controlled the money used to pay the user fees at issue in those cases. See App. at 11. This distinction is without merit. As this Court specifically recognized in *Sperry*:

> Unlike real or personal property, money is fungible. No special constitutional importance attaches to the fact that the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately.

493 at 303 n. 9.

It is of "no special constitutional importance," therefore, that Longshore paid the user fee directly to the government rather than if the government had deducted the amount of the user fee from Longshore's funds that the government controlled. Under either scenario, Longshore, like Sperry, has a property interest in his money which was used to pay the user fee. *Marshall*, 992 F.2d at 1176 (in the context of a user fee, plaintiffs "clearly have a property interest in the money they own").

The Federal Circuit correctly found that "[t]he definitive issue is whether [Longshore] had a property interest that was taken from him by government action." App. 6. However, the Federal Circuit's application of this finding is flawed because the court focused its inquiry on whether Longshore had a property interest in the service for which he paid the user fee and not on whether Longshore had a property interest in the money he used to pay the user fee. App. 6-9. The Federal Circuit's inquiry missed the point because Longshore's argument is not that he was denied a government benefit, permit or service in which he had some sort of property right. Rather, the gravamen of Longshore's complaint is that the government took too much of his property, *i.e.*, the amount of the user fee which is deemed to be unreasonable, as a condition for the use of the government service.

Whether Longshore had a property interest in using the government service is of no consequence. "Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit." *Dolan*, 129 L.Ed.2d at 316. Accordingly, this Court's inquiry in *Dolan* focused not on whether Mrs. Dolan had a property interest in obtaining her development permit, but rather on whether the City of Tigard required Mrs. Dolan to give the government a property interest she held that was excessive in relation to the burden her development would place on the community as a whole.

The City of Tigard could no more require Mrs. Dolan to dedicate a floodplain easement where such an exaction is not "roughly proportional" to the impact of granting a development permit than it could charge her a user fee to process her request for a development permit the amount of which is not "roughly proportional" to the cost incurred by the City in processing her permit application. Under either scenario, the City of Tigard would be forcing Mrs. Dolan "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole", *Armstrong*, 364 U.S. at 49, thus violating the takings clause.

Furthermore, the user fee paid by Longshore and others was paid for **processing their cellular applications** and was not a fee paid for the privilege of **using** the airwaves as implied by the Federal Circuit. *See* App. 11. The FCC has explicitly acknowledged that the purpose of 47 U.S.C. § 158 is to impose user fees to recover costs incurred in processing applications filed with the FCC and that the user fees are not a charge on the value of the license, *i.e.*, a spectrum fee. *Practice and Procedure: Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, Notice of Proposed Rulemaking*, 51 Fed. Reg. 25792, 25795 (¶ 26) and at n. 31, July 16, 1986. *See also* S. Hrg. 99-66, Reauthorization and Oversight of the Federal Communications Commission, Subcommittee on Commerce, Science, and Transportation, March 20, 1985, at 11, Testimony of then FCC Chairman Mark Fowler recognizing that user fees assessed on FCC applicants are intended to recover the "costs" for "specific services rendered."

Finally, the Federal Circuit opined that it is not the place of the judiciary to correct the mistakes of Congress. App. 8-9. This observation is true only to the extent such mistakes involve Congress' judgment. However, where an act of Congress violates the Constitution, it is beyond peradventure that the role of the judiciary is to guard against such legislation. *Marbury v. Madison*, 1 Cranch 137, 176-80 (1803). *See also United States v. Lopez*, ___ U.S. ___, 131 L.Ed.2d 626 (1995) (striking down legislation which fell outside the scope of Congress' powers as enumerated in the Constitution); and *United States v. Munoz-Flores*, 495 U.S. 385, 397 (1990) ("[t]o survive [the Supreme] Court's scrutiny, the 'law' must comply with all relevant constitutional limits").

II) THE FEDERAL CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH A DECISION OF THE ELEVENTH CIRCUIT

The Federal Circuit's decision is in direct conflict with the Eleventh Circuit's decision in *Marshall*. *Marshall* involved a complaint by customers of a governmental district alleging that user fees imposed upon customers to pay for the debt on bonds issued by the district constituted a taking.

The majority opinion, citing *Sperry*, held that a plaintiff must allege that the user fee is unreasonable in order to avail himself of the protection afforded by the Takings Clause. 992 F.2d at 1176. Finding that the plaintiff failed to allege that the user fee was unreasonable, the majority held that the complaint failed to state a claim upon which relief could be granted. *Id.* The minority opinion, also

citing *Sperry*, found that the plaintiffs did allege that the fee at issue was not reasonable and "[a]ccordingly, plaintiffs have stated a takings claim" *Id.* at 1177 (dissenting opinion).

Thus, although the majority and minority came to different conclusions in *Marshall* based on differing analyses of the facts, both interpreted this Court's holding in *Sperry* in the same manner as Longshore – a plaintiff states a takings claim by alleging that a user fee is unreasonable. Importantly, the majority opinion in *Marshall*, in contrast to the Federal Circuit's decision, found that in the context of a claim alleging that a user fee constitutes a taking, plaintiffs "clearly have a property interest in the money they own." 992 F.2d at 1176.

III) THE QUESTION PRESENTED IS IMPORTANT

This case offers the Court the opportunity to reaffirm the constitutional limitation on the imposition of user fees previously enunciated by the Court in *Sperry* and *Webb's*, *viz.*, user fees must be reasonably related to, or a fair approximation of, the costs incurred by the government in providing the service for which the fee is imposed. Such a reaffirmation is important in light of the increasingly widespread utilization of user fees because it will prevent some persons from being forced to alone bear public burdens which, in all fairness and justice, should be borne by the public as a whole, while preserving the goals of efficiency and equity that are the hallmarks of reasonable user fees.

The federal government imposes and collects tens of billions of dollars in users fees annually. *See generally, The*

Growth of Federal User Fees, Congressional Budget Office (August, 1993).[2] In addition, what the CBO defines as federal "user fees" increased by 46% between 1980 and 1991, while what the CBO defines as "regulatory fees" more than tripled during that time period. *Id.* at pp. x; 42-53. Moreover, it has been estimated that 20% of all state and local revenues collected in 1984 were derived through the imposition of user fees. Clayton P. Gillette and Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U.L.Rev. 795, 797 n. 9 (1987).

The popularity of user fees with governmental bodies and the widespread support such user fees enjoy among the general public is justifiable: user fees promote the efficient allocation of government resources and equitably assign the costs of such services to the actual users. If, however, governmental bodies are left free to impose user fees without constitutional limits, efficiency and equity would be impeded, if not destroyed. Furthermore, and perhaps more importantly, instead of embracing user fees as a preferred method of raising revenue to offset the costs of providing services, individuals will cast a jaundice eye on any attempt to impose a user fee, fearing that the governmental body is imposing a user fee on them to subsidize another service which is provided to someone else.

Without the basic constitutional limitation of the Takings Clause, user fees will inevitably degenerate from an efficient and equitable method of preserving government

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[2] The types of user fee affected by this case fall under what the CBO terms as either a "user fee" or a "regulatory fee" in its publication. *See Growth of Federal User Fees* at p. x.

resources and defraying the costs of government services to a divisive means of raising revenue that will only add another layer to the growing cynicism that poisons the relationship of trust that exists between government and the people, the relationship upon which our society is based.

Finally, although reaffirming this Court's test in *Sperry* will, no doubt, spawn some litigation over the reasonableness of various user fees, the burden of proving unreasonableness falls heavily on plaintiff to establish that the challenged user fee is indeed unreasonable. *Sperry*, 493 U.S. at 60. Moreover, litigation will be limited because the overwhelming majority of user fees are reasonably related to, or a fair approximation of, the costs incurred by the government in providing the service for which the user fee is imposed. Indeed, most user fees fall well short of recouping close to all of the costs of a particular service. Nonetheless, in order to prevent the loss of efficiency and equity which flow from the imposition of reasonable user fees, it is important to unequivocally remind all levels of government, as well as the general public, that the imposition of user fees is restrained by the strictures of the Takings Clause – user fees must be reasonably related to the costs incurred in providing the services for which the fees are imposed.

CONCLUSION

Because the decision of the Federal Circuit is in direct conflict with the constitutional principle announced by this Court in *Sperry* and *Webb's*, the decision of the Federal Circuit should be summarily reversed and vacated and this action remanded to the United States Court of Federal Claims. In the alternative, the petition for writ of certiorari should be granted.

Respectfully submitted,

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April, 1996

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

95-5026

MICHAEL D. LONGSHORE, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

William E. Zimsky, of Durango, Colorado, argued for plaintiffs-appellants.

John Carlton Erickson, III, Attorney, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellee. With him on the brief were *Frank W. Hunger,* Assistant Attorney General and *David M. Cohen,* Director. Also on the brief were *Roberta Cook* and *S. Lee Martin,* Attorneys, Office of General Counsel, Federal Communications Commission, Washington, D.C., of counsel.

Appealed from: United States Court of Federal Claims

Judge Hodges

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

95-5026

MICHAEL D. LONGSHORE, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: February 21, 1996

Before MICHEL, PLAGER, and RADER, *Circuit Judges*.

PLAGER, *Circuit Judge*.

This case presents a novel takings argument: that the application fee levied by Congress as the price of participating in the federal lottery for a cellular radio system license violates the Fifth Amendment's prohibition against taking of private property for public use without just compensation. Appellant Michael D. Longshore also argues that the fee violates the Constitution's Taxing Clause and imposes a wrongful exaction which he is entitled to have refunded. The Court of Federal Claims dismissed his claims. He appeals.

BACKGROUND

This appeal is before us following the trial court's grant of the Government's motions to dismiss. The Takings count was dismissed for failure to state a claim upon

which relief could be granted. The tax count was dismissed on jurisdictional grounds. The Government on appeal recognizes that the Court of Federal Claims had subject matter jurisdiction over the tax count, which seeks refund of a wrongful exaction. ***See United States v. Testan,*** 424 U.S. 392, 401-02 (1976) (Court of Federal Claims has jurisdiction over claims for return of improper exactions). The Government argues that dismissal was appropriate nevertheless because Longshore has failed, again, to state a claim upon which relief could be granted. Because ultimately we review the judgment, not the reasoning, of the trial court, we consider whether, as the Government contends, the dismissal was correct because appellant has failed to state a claim upon which relief may be granted.

We take as true the well-pled allegations of the complaint. ***Henke v. United States,*** 60 F.3d 795, 797 (Fed. Cir. 1995). The facts before us, and which are set out herein, are those pled in the complaint, and not necessarily those that can be established at a trial on the merits.

In 1982, Congress enacted the Communications Amendment Act of 1982, Pub. L.No. 97-259, § 115, 96 Stat. 1087, 1094-95, *codified at* 47 U.S.C. § 309(i), which authorizes the Federal Communications Commission (FCC) to employ a random selection process, known as a lottery, in selecting licensees for certain communication services regulated by the FCC. In 1985, the FCC adopted rules for using the lottery process in awarding cellular radio system licenses. 47 C.F.R. §§ 1.823, 22.33 (1994). In 1986, Congress enacted the Comprehensive Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272, § 5002(e), 100 Stat. 82, 118, *codified at* 47 U.S.C. § 158 (1988). That

statute required that a $200 application fee accompany each application for participation in the lottery for licenses to construct and operate a domestic cellular radio system in an area designated by the FCC as a rural service area market (RSA). 47 U.S.C. § 158(g) (1988).[1]

Appellant participated in the lottery for RSA cellular radio licenses and filed 312 applications for licenses covering various RSAs. With each application appellant submitted the required $200 fee, for a total of $62,400. Appellant apparently did not succeed in obtaining any licenses.

In July 1994, appellant filed a complaint against the United States in the Court of Federal Claims. Appellant alleged and on appeal asserts that the FCC incurs only approximately $20 in processing applications for participation in the lottery and determining whether an application is acceptable for filing, far less than the $200 application fee. Appellant further alleged that in establishing the $200 application fee, Congress intended "to recoup the costs of regulation which the FCC incurred in processing a cellular application." Appellant alleged that Congress enacted the $200 statutory fee based upon the FCC's representations regarding its estimated processing costs. Appellant alleged that the FCC intentionally misled Congress by recommending a fee in excess of its true projected costs, in order to raise revenue and to discourage the filing of RSA cellular applications. Appellant further alleged that to the extent that it exceeded the

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[1] The fee has since increased to $230.00. *See* 47 U.S.C. § 158(b) (authorizing FCC to adjust fees to reflect changes in Consumer Price Index).

FCC's actual administrative costs for processing lottery applications, the $200 application fee constituted an uncompensated taking of private property, in violation of the Fifth Amendment.

Appellant on appeal asserts that because the FCC's actual costs were under $20 per application, the $200 fee constituted an unreasonable "user fee" for a government service, which appellant contended is a cognizable taking under established Supreme Court jurisprudence. Appellant also asserts that the allegedly excessive fee violated Article I, § 8, clause 1 of the Constitution, which reserves to Congress the power to lay taxes. U.S. CONST. art. I, § 8, cl. 1. The gravamen of appellant's argument in this regard is that by falsely informing Congress that a $200 application fee was needed to cover the administrative costs of reviewing license applications, the FCC effectively caused Congress to levy a tax on applicants that inured to the benefit of the general Treasury and public, and thereby improperly usurped Congress' taxing authority under the Constitution's Taxing Clause.

In a brief order, the trial court dismissed both of appellant's claims. ***Longshore v. United States,*** No. 94-447C (Ct. Fed. Cl. Nov. 4, 1994). The court found that "[a] payment made voluntarily is not a taking," citing ***Dolan v. City of Tigard,*** 114 S. Ct. 2309 (1994) and ***Federal Communications Commission v. Florida Power Corp.,*** 480 U.S. 245 (1987). The court further found that "[t]he taxing clause does not mandate compensation for damages sustained," citing ***United States v. Connolly,*** 716 F.2d 882 (Fed. Cir. 1983) (***in banc***), ***cert. denied,*** 465 U.S. 1065 (1984), and ***Orange Cove Irrigation District v. United States,*** 28 Fed. Cl. 790 (1993). Because it dismissed

appellant's claims, the trial court did not address appellant's motion for class certification.

This appeal followed.

DISCUSSION

Whether appellant has stated a claim upon which relief can be granted raises a question of law which we decide anew and without special deference to the trial court on that matter. ***Gould, Inc. v. United States,*** 935 F.2d 1271, 1273 (Fed. Cir. 1991). Much of the argument by the parties on the takings claim focuses on the question of whether appellant's payment of the application fee was truly "voluntary," and exactly what is the meaning of voluntary in the context of an application for a government benefit. Presumably this reflects the trial court's statement that "[a] payment made voluntarily is not a taking." The parties also devote considerable effort toward distinguishing between user fees and other forms of fundraising by the government.

The definitive issue with respect to appellant's takings claim, however, is whether appellant had a property interest that was taken from him by government action. Appellant does not claim that he had a fundamental right to access to the radio spectrum, nor could he. ***See*** 47 U.S.C. § 301 (1988); ***Red Lion Broadcasting Co. v. Federal Communications Comm'n,*** 395 U.S. 367, 376-77, 389 (1969). He does not claim that Congress has exceeded its constitutional authority to control and regulate access to the spectrum. ***See National Broadcasting Co. v. United States,*** 319 U.S. 190, 216 (1943) (upholding licensing scheme under Communications Act of 1934 against First

Amendment challenge and charge that statutory standard for FCC regulation was unconstitutionally vague). ***See also Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.,*** 289 U.S. 266, 279 (1933) (citing broad powers of Congress to regulate access to spectrum, stemming from Commerce Clause, scarcity of spectrum, and need for national regulation to foster orderly development and use of spectrum); ***Federal Communications Comm'n v. Pottsville Broadcasting Co.,*** 309 U.S. 134, 137-38, 141 (1940) (same); ***National Broadcasting Co. v. United States,*** 319 U.S. 190, 213, 227 (1943) (same). Appellant does claim that he was "vested" with the statutory right to participate in the lottery once the lottery system was established, and that the Government may not condition such participation on the "extraction of an unreasonable fee." Yet he has no preexisting right to participate in the lottery independent of payment of the statutory fee; he may only participate if he pays.[2]

Appellant's claim relies heavily on the notion that Congress intended to set an application fee based on the need to recoup the FCC's handling costs; that the FCC either through venality or ignorance gave Congress a cost figure that was too high; and that in adopting the FCC's recommended figure, Congress caused anyone who chose

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[2] Appellant's citation to ***Maxcell Telecom Plus, Inc. v. Federal Communications Commission,*** 815 F.2d 1551 (D.C. Cir. 1987), in support of his asserted rights, is unavailing. If anything, ***Maxcell*** confirms that only those applicants who comply with FCC procedures (of which the filing fee is one) are "bona fide" applicants entitled to consideration. 815 F.2d at 1561.

to participate in the lottery, and thus paid the statutory fee, to experience a "taking" of their property.

The argument is without merit. Congress' intent may sometimes be relevant when the words of an enactment are less than clear, and the court struggles to enforce the law in a manner as consistent with the intent and purpose of Congress as a court can ascertain. Here there is absolutely no ambiguity regarding the rule Congress laid down. A person who wishes to participate in the lottery pays $200 per application or he does not participate. To suggest that a court should undertake an inquiry into whether Congress, in fixing the fee at $200 rather than some other figure, did its sums correctly, is to invite an intrusion by the judiciary into the work of Congressional committees and staff, and into the minds of Congress itself, which would be nothing but an invitation to mischief.

By the same token, whether Congress and the agency misunderstood each other, or whether the agency, deliberately or inadvertently, misled Congress regarding its administrative costs, is a matter between Congress and its creation. "Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal." ***Federal Communications Comm'n v. Pottsville Broadcasting Co.***, 309 U.S. 134, 146 (1940). Congress has undoubted capacity to oversee the performance of Executive Branch agencies, consistent with its constitutional authority. It is not for this court to instruct Congress on how to oversee and manage its creations. In this case Congress set the fee and arranged to have the income from the fees accrue to the general treasury and not to the agency. The level at which the fee

was to be set, and why, and where the excess over costs should go, were decisions made by Congress itself. It would ill-behoove this court to tell Congress it could not lawfully make those decisions.[3]

The same point lays to rest appellant's argument that setting the fee at $200 resulted in a violation of Congress's power to tax under the Taxing Clause. Appellant's argument seems to be that because Congress thought it was enacting a user fee keyed to the agency's costs, and the agency misled Congress as to its costs, the enactment of a fee greater than actual projected costs resulted in the levy of a general tax. Because the agency engineered this result through false testimony before Congress, it effectively usurped the constitutional taxing authority which is Congress' alone. The answer to this argument, again, is simply that Congress chose the amount to be charged, and where that amount was to go. Even if we were to assume that Congress acted foolishly, or mistakenly, or ignorantly, that is a matter that only Congress can correct, absent some clear breach of its constitutional powers. *Cf.* ***National Cable Television Ass'n v. United States,*** 415 U.S. 336, 342 (1974) (noting that an unconstitutional delegation of the Congressional taxing power may occur when an agency, without specific guidelines from Congress, charges fees that reflect the provision of public as well as private benefits).

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[3] We note again that appellant has not based his challenge on any purported overstepping of Congress' constitutional authority to regulate access to the spectrum deriving from the Commerce Clause or otherwise.

The advocates for each side cite to a number of cases, none of which is on point. Appellant relies in particular on two cases for his position. One is ***United States v. Sperry Corp.***, 493 U.S. 52 (1989), and the other is ***Webb's Fabulous Pharmacies, Inc. v. Beckwith,*** 449 U.S. 155 (1980). Neither case supports appellant's position on the facts of his case. ***Webb's*** involved a state statute that required the clerks of court in interpleader actions to invest at interest sums paid into escrow with the court. The interest so earned was then to be paid not to the owner of the sums, but to the court's coffers. Since a separate fee for services was by statute levied on the owner, as recompense for the clerk's services, the confiscation of the earned interest could not be attributed to any services provided. Emphasizing that "[t]he earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property," 449 U.S. at 164, the Supreme Court had no trouble seeing the payment of the interest to the state court as a taking for which compensation was due the owner of the sums that earned the interest. ***Id.*** at 164-65.

In ***Sperry,*** Congress levied a fee on awards issued by the Iran-United States Claims Tribunal to American claimants against the Iranian government. The American bank handling the asset transfer withheld the fee as reimbursement to the United States for the Tribunal's operational costs. The Supreme Court held that the fee assessed did not transgress the Fifth Amendment's prohibition against takings without just compensation. The Court found that the Government's fee was sufficiently related to the benefits received from the Government, and that it

was not excessive in relation to those benefits. 493 U.S. at 62-64.

In both *Webb's* and *Sperry,* the Government withheld a portion of a privately owned asset which it held or controlled. In *Webb's* there was no justification for the withholding, and it was held wrongful; in *Sperry* there was justification, and it was not. In the case before us, the Government had possession and control of access to the airwaves. That asset, if one wishes to call it that, did not belong to appellant or any other applicant, and no applicant had rights to use it until the FCC issued a proper license. Obtaining that license required participation in a publicly held lottery, for which an entry fee was charged. Congress set the fee, and the FCC collected it. Nothing in either takings law or tax law lends even remote support to appellant's cause. Isolated sentences from cases, taken out of context and thereby rendered inconsistent with the actual holdings in the cases, do not establish a cause of action. Nothing in the circumstances of this case moves the court to attempt to construct a new and novel theory for recovery, which would be the minimum required in order to find that appellant has stated a claim upon which relief may be granted. The trial court's dismissal of both counts is therefore

AFFIRMED

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MICHAEL D. LONGSHORE, *Plaintiff,* v. UNITED STATES OF AMERICA, *Defendant.*	No. 94-447 C Filed: November 4, 1994

ORDER

Plaintiff seeks class certification of an action challenging the $200 fee for each application to the Federal Communications Commission to construct and operate a cellular radio system. Defendant filed a motion to dismiss.

Plaintiff contends that a substantial portion of the fee exceeds defendant's processing costs and constitutes a Fifth Amendment taking. An identical claim by other plaintiffs previously was brought in this court by plaintiff's counsel and dismissed by Senior Judge Kenneth R. Harkins for failure to state a claim. *Rubana Cellular Company v. United States,* No. 92-766C (Fed. Cl. Sept. 8, 1993), *aff'd,* 29 F.3d 645 (Fed. Cir. 1994) (mem.). "Plaintiffs present an imaginative argument that is innovative and agile to the point of sophistry. Plaintiffs' reasoning and analysis, however, is flawed." *Rubana* at 5.

Plaintiff's counsel contends that in the prior consolidated cases, the taking issue centered on whether defendant provided the service for which the fee was enacted, while in this case, he argues that the fee is not reasonably related to the costs incurred in providing the service. Plaintiff also claims that the fee constitutes a tax imposed by the Federal Communications Commission in violation of the taxing clause of the Constitution. This theory was not presented in the prior cases. Plaintiff contends that the Commission used "intentional and surreptitious misrepresentation by which the FCC was able to seize the power to levy taxes" because Congress intended that the fee only reimburse government costs.

A payment made voluntarily is not a taking. *See Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994), and *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. 245, 251-52 (1987). The taxing clause does not mandate compensation for damages sustained. *See United States v. Connolly*, 716 F.2d 882, 886-87 (Fed. Cir. 1983) (en banc), and *Orange Cove Irrigation District v. United States*, 28 Fed. Cl. 790, 800 n. 3 (1993).

Defendant's motion to dismiss Count I for failure to state a claim and Count II for lack of jurisdiction is GRANTED. The Clerk will enter judgment dismissing the complaint. Costs to defendant.

/s/ Robert H. Hodges, Jr.
Robert H. Hodges, Jr.
Judge